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Supreme Court, U.S.
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No._____

IN THE

SUPREME COURT OF THE UNITED STATES

UNA MAE DAVIS, *PETITIONER*

vs

CLEVELAND HAMONDS, JR., SUPERINTENDENT

ST. LOUIS PUBLIC SCHOOLS DISTRICT,

RESPONDENT(S)

ON APPEAL FROM THE UNITED STATES EIGHTH

CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Did the Appeal Court err by granting a Motion for Summary Judgment Decision when there is a genuine dispute that exit in an individual racial, sex and age discrimination claim.

(2) Did the Appeal Court err by granting a Motion for Summary Judgment when Appellant established a prima facie case of McDonnell v. Green, 411 U.s. 792 (1973) and succeeding case laws.

(3) Did the Appeal Court and lower court err when it issued a dismissal decision for a Summary Judgment prior to twenty-days allow for response by Petitioner under 4.01 of the Local Rule.

(4) Did the Appeal Court err by granting a Motion for Summary Judgment Decision when the Respondent's non-legitimate reasons were showed to be pre-textual to foster race and sex and age discrimination.

(5) The Appeal Court and lower court erred when ruling on a Motion for Summary Judgment in their acceptance and reliability on an unsubstantiated sworn affidavit under Rule 56 Fed R. Civ. Procedures from a witness who had no personal knowledge of the events for which she testified in her sworn affidavit.

(6) The question before the Supreme Court is whether the record, when viewed in the light most favorable to the non-moving party, that the Appeal Court and lower court can issue a decision granting summary judgment when a genuine issues exist, and as long as the "slightest doubt" remains as to the facts. Fed. R. Civ. P. 56(c).

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All parties appear in the caption of the case on the cover page.

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The United States Court of Appeals for the Eighth Circuit's opinion **(Pet. APP. A)** unpublished.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. The Court's jurisdiction is invoked under 28 U.S.C. section 1254(1).

STATUTES INVOLVED

28 U.S.C. section 1331, 28 U.S.C. section 1391; Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000, *et.seq*., 42 U.S.C. section(3)(16)(c) and 42 U.S.C. 2000(e)(5), 42 U.S.C. 794, *et.seq*., and age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. sections 621 *et. seq.*

STATEMENT

Una Mae Davis, an African American female, was a former St. Louis Missouri Public School Teacher for approximately nine (9) years with the St. Louis Board of Education of the City of St. Louis, until she voluntarily resigned for personal reasons. For the years December 1999, April 2000 and 2001 Petitioner submitted three separate applications for employment with the St. Louis School System. Petitioner had a life time teaching certificate, without a time limitation; the life time teaching certificate provided to the Petitioner was not revoked, suspended nor had it expired; Life Classification refers to certificates issued and maintained without completing any further requirements after the initial issue. These certificates were issued until September 1, 1988 to graduates of Missouri teacher education programs approved by the Missouri Department of Elementary and Secondary Education, who met the minimum certification requirements

established by the Missouri State Board of Education. This classification will continue to be valid for the life of the teacher. The Petitioner met the necessary prerequisite and qualified for a life classification certificate, for elementary education without having to requalify; Petitioner's work conduct and attendance during the period of her employment from 1985 to 1993 was above reproach; Petitioner's three separate applications were held during each of the one (1) year precondition periods after submission, February 1999, April 2000, April 2001. The employer solicited other applicants with minimum qualification or inexperience for the position of teachers for which the Petitioner applied and was eventually rejected by Respondent on all Petitioner's three separate applications causing this claim herein.

Davis filed her initial administrative charges in a letter to the Equal Employment Opportunity Commission ("EEOC") on June 19, 2001, charging that she had been discriminated against, due to her race and sex and age and color and national origin and religion. **[See Pet. App. B]**

SUMMARY OF ARGUMENT

An abuse of discretion, warranting reversal judgment rendered to Petitioner on all claims.

ARGUMENT

In McDonnell Douglas, 411 U.S. 792 (1973) and a number of succeeding cases, the Supreme Court set forth the analysis to be applied in determining whether a prima facie case has been established. The exact evidence required for a prima facie case will vary, since each allegation of discrimination is based upon a set of facts peculiar to that case. In general, a prima facie case requires a showing of circumstances, which give rise to an inference of unlawful discrimination. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981); *Bauer v. Bailar*, 647 F.2d 1037 (10th Cir. 1981).

Establishment of a prima facie case requires more than a mere showing of an adverse employment decision, which affected a member of a protected group. The complainant must produce evidence sufficient to raise an inference of a causal connection between the protected group status and the employer's actions. *Stanojev v. Ebasco Service, Inc.* 643 F.2d 914 (2nd Cir. 1981). *Under McDonnell Douglas and Burdine*, supra., the Courts established a three-stage system to clarify the basic allocations of burdens and order of presentation of proof in a case alleging discriminatory treatment. The first step in that process requires the Complainant to establish a prima case of discrimination. She may do this by establishing that she is a member of a protected group, and was treated differently or less favorably than others not of her protected category who were similarly situated. *Teamsters v. United States,* 431 U.S. 324 (1977); *McDonald v. Sante Fe Trail Transportation Co.* 427 U.S. 273 (1976). This prima facie case rests on the assumption that fulfilling its requirements establishes facts from which an inference can be drawn that if the employer's actions remain unexplained, "...it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act". *Furnco Construction Co. v. Waters*, 438 U.S. 567, at 576 (1978). If the Complainant is successful in establishing a prima facie case, the employer must then, "...articulate a legitimate nondiscriminatory reason..." for the employment decision. Once a prima facie case is shown, the burden shifts to the employer to rebut the presumption of discrimination raised by the prima facie case: by producing evidence that complainant was rejected, or someone else preferred, for a legitimate 'nondiscriminatory reason'. To accomplish this, the employer must clearly set forth, by admissible evidence, reasons for complainant's rejection. As the Supreme Court stated, the employer cannot meet its burden merely through an answer to the complaint or by argument of counsel. *Burdine*, supra, at note 9. In the instant matter the employer failed its obligation.

Because of the similarity of a refusal to hire and a refusal to rehire, the McDonnell Douglas model is the most applicable to the facts of this case. In June 21, 2002, Davis filed a complaint in federal court, alleging claims under Title VII, race and sex discrimination and the federal Age Discrimination in Employment Act ("ADEA") requesting a jury trial. Davis established all the above elements necessary for a prima facie case of race and sex and age discrimination (that is – she is a member of groups protected for race, age and gender status, she applied for a position for which she met the qualifications for consideration, she was rejected and others arguably had similar qualifications were sought or hired thereafter.

Hammonds, did not initially answer the complaint, but opted to file a motion for summary judgment as to the complaint file by Davis, seeking dismissal in its entirety, "For Failure to State a Claim". In addition, Hammonds argues that Davis' sex claim was barred because Davis failed to exhaust her administrative remedies by failing to file a charge of discrimination with the EEOC alleging sex discrimination. Davis argued in her motion of opposition that her discrimination claims were appropriate and timely filed against Hammonds in his capacity as Superintendent of the Board and not as an individual. The District Court on August 15, 2002 granted the Board's motion for summary judgment in part and denied in part, dismissing Davis' claim of gender discrimination for lack of jurisdiction, without prejudice, while granting Davis' claim of race and age discrimination against Hammonds and the Board.

Davis argued that during the initial complainant filed with EEOC that she submitted a written communication June 19, 2001, outlining her allegations of discrimination. This letter was acknowledged by EEOC, who initiated a letter to be replied to by the Respondent. Davis in her claim and notification identified race, color, age, national origin,

religion, and sex as a basis for her complainant. The district court should not have dismissed any of Davis' Title VII claims on the grounds that they were not timely filed with the EEOC. On September 30, 2002, Davis requested from the district court leave to file an amended motion to the original complaint in federal court, alleging claims under Title VII sex discrimination and the federal Age Discrimination in Employment Act ("ADEA") requesting a jury trial. Davis unambiguously stated to the court that this amended complaint was to add sex and age to the original Complaint. The motion was granted by the district court **[Pet. App. C].** The district court's approval of the amended Motion is not reflected in the Docket Text, the district court never explained its failure to consider Davis' motion "leave to file an amended motion" (consolidate) on September 30, 2002, to the original complaint in federal court, alleging claims under Title VII sex discrimination and the federal Age Discrimination in Employment Act ("ADEA"), demanding a jury trial. The district court erred when dismissing the amended complaint, which was filed in accordance to law. The purpose of filing charges with the EEOC is to instigate an investigation.[1] The district court erred by not considering evidentiary material filed with exhibits to Petitioner's opposition to the motion for summary judgment, never responding to Davis objections.

Fed.R.Civ.P. Rule 12(a)(1)(A)(B) state that, "a defendant ***shall*** serve an answer within 20 days after being served with the summons and complaint, or if service of the summons has

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[1] Sanchez v. Standard Brands, Inc., 413 F.2d 455, 466 (5th Cir. 1970). Technical omissions of legal theories from an EEOC charge will not preclude a plaintiff from including such theories in a Title VII complaint, so long as the acts upon which the theories are based are noted in the charge. Matthews v. A-1, Inc., 748 F.2d 975, 977 (5th Cir. 1984). See also Ray v. Freeman, 626 F.2d 439, 443 (5th Cir. 1980), cert. Denied, 450 U.S. 997, 68 L.Ed. 2d 198 (1981) (court will entertain cause of action as long as allegations in complaint are reasonably related to EEOC charges); Sanchez, 431 F.2d at 465 (procedural technicalities are not to stand in the way of Title VII complainants).

been timely waived on request under F.R.C.P. 4(d), within 60 days after the date when the request for waiver was sent". Clearly, no waiver was declared and this violated the applicable court's rules, nevertheless this court ignored the word ***shall*** and allowed Respondent [defendant] to answer the initial complaint, outside the boundaries of response and without waiver. Well after the set time of limitation as mandated by the statute, [approximately 3 months]. In contrast the District Court erred under Rule 4.01 of the Local Rule, "a party in opposition to a motion for summary judgment under Fed.R.Civ. 56 shall file a memorandum and any appropriate documentary evidence twenty (20) days after being served with the motion". Plaintiff was not served with the motion for dismissal and alternative motion for summary judgment until after October 8, 2002, the defendant's date of service by mail to the district court. Plaintiff responded to the defendant's motion for dismissal and motion for summary judgment in a timely fashion, on October 29, 2002. Inappropriately the Judgment and Order was issued on October 23, 2002, hastily and wholly within fifteen days (15) of entry, denied Petitioner an opportunity to present evidence in opposition to Respondent's summary judgment motion. With out a doubt the District Court erred when it refused acceptance of Petitioner's motion in opposition to Respondent's summary judgment motion, returning Petitioner's said motion as being untimely denying Petitioner's motion in opposition dated October 29, 2002, which was arbitrary. Also, the District Court refused Petitioner's motion for relief filed November 7, 2002, for relief from judgment or order due to the mistake.

Davis filed her second administrative charges with the Equal Employment Opportunity Commission ("EEOC") on August 22, 2002, as a result of her complaint being dismissed without prejudice, which was filed timely with EEOC as a new complaint. In any event, Davis subsequent to receiving the district court's dismissal ruling October 23, 2002, on her

amended complaint, received a notice of right to sue letter, dated February 21, 2003 from the Missouri Commission on Human Rights, pursuant to Section 213.111 RSMO providing Davis a right to bring a civil action within 90 days against the City of St. Louis Board of Education/Cleveland Hammonds Jr. Superintendent. Davis on May 22, 2003, filed a complaint alleging race and sex and age discrimination, accordingly. Hammonds and Board filed a motion to remove Davis' age and sex discrimination claim from the state court. Davis filed a motion in opposition to Hammonds' motion to remove from state court, which the district court rejected, upholding the removal and dismissing Davis sex and age claim. Davis disagrees. Davis argues that she filed her complaint within 300 days of the time that a reasonable person should have concluded that she was not going to be hired. Specifically, Davis contends that it would have been within reason for her to take until August 2002, rather than the end 300-day period from which she filed her last application August 27, 2001 to reach the conclusion that she was not going to be hired. The date, August 22, 2002, is within 300 days of February 2002 the hiring of the Caucasian male. Davis argues the appropriateness of employing the "discovery rule" (rule that a claim does not accrue until the injury is discovered or in the exercise of reasonable diligence should be discovered). Title VII case law states as the test to be applied: Whether or not the facts that would support a charge or claim of discrimination should be apparent to a person with a reasonably prudent regard for his or her rights similarly situated to the Complainant. See *Reed v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924, 11 FEP Cases 235 (5th Cir. 1975). In support of her position, Davis argues that at the time of her submissions of three (3) separate applications between the periods February 1999, April 2000, and April 2001, Hammonds and Board continuously responded to Davis' applications by acknowledging the receipt of those various applications, and representing that those applications were being processed and would be kept for consideration for

one year. Mindful that Davis applied for teaching positions within the spirit and intent of her lifetime teaching certificate qualifications, which unequivocally is meant for qualifying a recipient for life, teaching in the state of Missouri. Davis on several occasions made inquiries as to her status, with no resolve; attended job fairs; and requested intervention of State Representative on her behalf, without success. After filing an EEOC discrimination claim in June 2001, Davis received an interview allegedly for a teaching position that was not available at the time of the interview, as a camouflage and an attempt to derail the discrimination claims.

In this regards, both Title VII of the Civil Rights Act of 1964, 42 U.S.C. section 2000e-2000e-17 (2001), and the Age Discrimination in Employment Act, 29 U.S.C. section 621-634 (2001), generally required the filing of an administration charge with EEOC within 180 days of the alleged discriminatory conduct. 29 U.S.C. section 626(d); 42 U.S.C. section 2000e-5(1). *Walker v. St. Anthony's Med. Ctr.*, 881 F.2d 554, 556 (8th Cir. 1989). This is not a jurisdictional requirement, rather the time period for filing a charge with the EEOC is analogous to a statute of limitations, and may therefore be subject to equitable tolling or waiver. *Zipes v. Trans World Airlines Inc.*, 455 U.S. 385, 389, 71 L.Ed 2d 234, 102 S. Ct. 1127 (1982) (noting that a literal reading of Title VII's filing provision was "particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, initiate the process"); *Johnson v. Al Tech Specialties Steel Corp.*, 731 F.2d 143, 146 (2d Cir. 1984) ("The remedial purpose of the civil rights legislation as a whole would be defeated if aggrieved plaintiffs were absolutely barred from pursuing judicial remedies by reason of excusable failure to meet the time requirements"). The essence of the doctrine of equitable tolling "is that a statute of limitations does not run against a plaintiff who is unaware of his cause of action." When alleged employment practices are "continuing" in

nature, the limitation period does not begin to run until the last occurrence of discrimination.[2]

Hammonds and Board throughout the hire process committed misconduct by intentionally lulling and misleading Davis and is responsible for the unawareness of this cause of action that is being filed by Davis. The equitable tolling will delay the start of the EEOC filing period from the date of the last application to the date Hammonds hired the Caucasian male (younger) in February 2002. Davis filed her second complaint with EEOC August 22, 2002, within the proscribed time frame. In this regards Davis argues that the defendant hired a male applicant [Caucasian], uncertified, to serve in capacity as a teacher in February 2002, who also appear to be younger than the Appellant. In August 2002 the Appellant filed a discrimination complaint with the Equal Employment Opportunity Commission, well within 300 days, a "deferral state", subsequent to her having learned of the hiring of Thompson.

Davis refutes Respondent's assertion that Davis stated that "She was notified on August 27, 2001, that she would not be hired by the Board of Education" [Davis II Complaint], this is not true and clearly a mischaracterization of those facts surrounding this claim. Davis avers that her period of consideration for hiring would not have ended until April 2002 and not August 27, 2001 and that this position was one of many position that were later to be open. Interestingly, in King's affidavit, the defendant's witness attested that, "I advised Joyce Roberts, Principal of Laclede School, on

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[2] Hukkanen v. International Union of Operating Eng'rs 3 F.3d 281, 285 (8th Cir. 1993) (interpreting the Title VII 180-day limitations provision, section 2000e-5(e)(1), finding an alleged pattern of discrimination that culminated in discharge); International Bhd. Of Elec. Workers v. Union Elec. Co., 761 F.2d 1257 n.1 (8th Cir 1985) (interpreting the ADEA limitation provision, section 626(d)(1), finding an alleged continuing practice and triggering of the limitations period by the termination of allegedly unlawful practice.

August 27, 2001, that due to low enrollment at Laclede School, Roberts did not have a third grade teaching vacancy to offer to Davis or any other individual". [**Pet. APP. D** Defendant's motion for summary judgment original complaint, 6/30/02]. Yet the Respondent hired Tonja Perkins, August 25, 2001, one day after the Petitioner was hired, August 24, 2001. While King's statement if assumed to be correct reveals only that no vacancy existed.

Moreover, Davis' argument is completely opposite to the lower courts and Respondent's argument that Davis' knew that she would not be hired in August 2001, which was the starting period for Davis to raise an issue of discrimination is a misinterpretation of Davis' claim.

Again, the law requires that "time limitation period" begins to run when a person with reasonably prudent regards for his/her rights knew or should have known that s/he was being discriminated against and in August 2001 cancellation by King standing along would not raise to that level required by law. The proper focus for when a statute of limitations begins to run is the time of the discriminatory act. *Chardon v. Fernandez*, 454 U.S. 6, 8 (1981); *Nance v. Maxwell fed. Credit Union*, 186 F. 3d 1338, 1341 (11th Cir. 1999). Five possible dates can be construed as the unlawful practice that triggered the limitations period: (1) February 1999 to April 2000; (2) April 2000 to April 2001; (3) April 2001 to April 2002; all inclusive date is when Davis had to resubmit her application each preceding year; (4) June 10, 2001, when Davis read in the Local newspaper article regarding the Board having hired a 32 year-old Caucasian female (younger) for a teaching position; or (5) February 2002 when Davis learned that the Board had hired an uncertified Caucasian male (younger) for a teaching position.

Davis argues in support of the fourth and fifth dates. She says that, at the time of her applications and submissions to the

Board that the Board continually informed her that her applications were being processed and that Board will keep Davis application for one year, always thanking Davis for her application and interest in a teaching position with the St. Louis Public Schools. At no time did the Board say or convey to Davis ***directly*** that her applications were not the strongest. This information came forward in the Defendant's letter submitted to the EEOC dated December 28, 2001. The Defendant also asserted that they determined as early as February 1999 that they were not going to hire Davis [pretextual], but never conveying that to Davis. Davis asserts that she could not have filed a complaint until she became aware of the Defendant's discriminatory intent. In reading the news articles dated June 2001 and February 2002, she learned that Tracy Reynolds, in addition to several other Caucasian employees and Jim Thompson had been hired. Thus, Davis contends, the limitations period did not begin to run until June 10, 2001 and February 28, 2002, respectively, bringing her EEOC charges filed on June 19, 2002 and August 22, 2002, respectively, within the limitation periods.[3]

In other words Davis argues that the law requires that "time limitation period" begins to run when a person with reasonably prudent regards for his/her rights knew or should have known that s/he was being discriminated against. Equitable tolling is appropriate when, despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his/her claim.[4]

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[3] 29 U.S.C. sections 626(d)(633) (1999); Reed v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 11 FEP 235 (5th Cir. 1975); Electrical Workers, IUE v. Robbins & Myers, Inc. 429 U.S. 229, 13 FEP 1813 (1976).

[4] Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir. 1991); Cada v.Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990); see also Reed, supra.

Specifically, Davis argues that the defendant hired a male applicant [Caucasian], uncertified, to serve in capacity as a teacher in February 2002, who also appears to be younger than the Appellant. In August 2002 the Appellant filed a second discrimination complaint with the Equal Employment Opportunity Commission, is well within 300 days, a "deferral state", subsequent to her having learned of the hiring of Thompson.[5] In other words Davis argues that the law requires that "time limitation period" begins to run when a person with reasonably prudent regards for his/her rights knew or should have known that s/he was being discriminated against. Equitable tolling is appropriate when, despite all due diligence, a plaintiff is unable to discover essential information bearing on the existence of his/her claim[6]

The district court erred in granting summary judgment on the age discrimination and dismissing the sex claim.

A. The district court erred in concluding that Davis' age and sex discrimination claims were somehow associated with June 2001 claim, rather than the February 2002 behavior of the defendant, as referred to in the Notice for the "Motion to Remand and Amend" Complaint [paragraph(s). 5 and 11, respectively] **[Pet. App. C].**

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits a party to move for a dismissal based on a court's lack of subject matter jurisdiction to hear the case. Dismissal under Rule 12(b)(1) is appropriate if the issue before the court is whether the plaintiff has failed to satisfy a threshold

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[5] 29 U.S.C. sections 626(d)(633) (1999); Reed v. Economic Opportunity Atlanta, Inc., 516 F.2d 924, 11 FEP 235 (5th Cir. 1975); Electrical Workers, IUE v. Robbins & Myers, Inc. 429 U.S. 229, 13 FEP 1813 (1976).

[6] Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir. 1991); Cade V Baxter Healthcare Corp., 920 F.2d 446, 452 (7th Cir. 1990); see also Reed, supra

jurisdictional requirement.[7] In order to properly dismiss for lack of subject matter jurisdiction under Rule 12(b)(1), the complaint must be successfully challenged on its face or on the factual truthfulness of its averments. See *Titus v. Sullivan*, 4 F.3d 590, 593 (8th Cir. 1993). In a facial attack, the court restricts itself to the face of the pleadings, and all of the factual allegations concerning jurisdiction are presumed to be true. Id. However, in a factual challenge, the court considers matters outside of the pleadings, and no presumptive truthfulness attaches to the plaintiff's allegations.[8] Furthermore, the existence of disputed material facts does not preclude the trial court from evaluating for itself the merits of jurisdictional claims. Id. at 729. "Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—its very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." Id. Moreover, the plaintiff has the burden of proof that jurisdiction does in fact exist. Id.[9] The Rule 12(b)(6) Motion to "Dismiss for Failure to State a Claim the district court erred.

Federal Rules of Civil Procedure Rule 56(c)

The Court must then determine whether there is a need for trial. In other words, there are genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson* 477 U.S. at 249-51, 106 S.Ct. at 2511. A genuine issue exists, thereby precluding summary judgment as long as the "slightest doubt" remains as to the facts section 2725 p. 425.

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[7] See Trimble v. Asarco, Inc., 232 F.3d 946, 955 n.9 (8th Cir. 2000).

[8] See Osborn v. United States, 918 F.2d 724, 729 n.6 (8th Cir. 1990.

[9] Rule 12(b)(6) of the Federal Rules of Civil Procedure test the legal sufficiency of the complaint. A complaint is not to be dismissed for failure to state a claim for which relief can be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim entitling her to relief.
-- Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The Rule 12(b)(6) Motion to "Dismiss for Failure to State a Claim the district court erred.

Clausent & Sons, Inc. v. Tho. Hamm Brewing Co., 39 F.2d 388 (8th Cir. 1968). In cases raising federally protected constitutional claims of substantive due process and freedom of speech, a Court should not grant summary judgment if there is the slightest doubt that remains a disputed, relevant fact. *Hayes v. Cape Henlopen School Dist.*, 341 F.Supp. 823 (D.C. Del. 1972).

A Court cannot resolve conflicts and credibility unless the opponent's evidence is too incredible to be believed by reasonable minds. *Baltz v. Shelly*, 66 F.Supp. 169, 179 (D.C. Ill. 1987) citing *Wright Miller* and *Kane* section 2722.

Summary Judgment

The question before the District Court is whether the record, when viewed in the light most favorable to the non-moving party, shows that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.[10] Essentially, the test is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-side that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. at 251-252. Moreover, although under Federal Rule of Civil Procedures 56 due deference must be given to the rights of litigants to have their claims adjudicated by the appropriate finder of fact, equal deference must be given under Rule 56 to the rights of those defending against such claims to have a just, speedy and inexpensive determination of the action where the claims have no factual basis. *Celotex Corp. v. Catrett*, 477 U.S. at 327.

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[10] Fed. R. Civ. P. 56©; see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986); Morgan v. Rabun, 128 F.3d 694 (8th Cir. 1997), cert. Denied,___U.S.___, 118 S. Ct. 1809 (1998); Get Away Club, Inc. v. Coleman, 969 F.2d 664, 666 (8th Cir. 1992); St. Paul Fire & Marine Ins. Co. v. FDIC, 968 F.2d 695 (8th Cir. 1992).

The court's role is simply to determine whether the evidence in the case presents a sufficient dispute to place before the jury. At the summary judgment stage, the court should not weigh the evidence, make credibility determinations, or attempt to determine the truth of the matter. Rather, the court's function is to determine whether a dispute about a material fact is genuine…If reasonable minds could differ as to the import of the evidence, summary judgment is inappropriate. *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996) (internal citations omitted). See also *Bell v. Conopco, Inc.*, 186 F.3d 1099, 101 (8th Cir. 1999) (court's function is not to weigh the evidence to determine truth of any factual issue).

Rule 56(e) Use of Affidavits in Summary Judgment

When submitted to support or oppose a summary judgment motion, an affidavit must be based on personal knowledge, must set forth facts that would be admissible at time of trial, and must establish the affiant's competence to testify.[11] The district court erred when it utilized Gloria King's affidavit **[Pet. App-E]** to support a summary judgment motion, which failed to satisfy the aforementioned prerequisites. King's affidavit was predicated upon purely hearsay and not of her personal knowledge. Davis' affidavit and material evidence contradicted the testimony of King that created a genuine issue of material fact that remains for trial. A summary judgment affidavit must be made on personal knowledge.[12] Affidavits based on "information and belief"-- facts that the affiant believes are true, but which the affiant does not know are true is not proper. See *Automatic Radio mfg. Co. v*

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[11] A summary judgment affidavit must be made on personal knowledge. Affidavits based on "information and belief" –facts that the affiant believes are true, but which the affiant does not know are true—are not proper. Likewise, inferences and opinions must be premised on first-hand observations or personal experience.

[12] See Stagan v. Ryan, 176 F.3d 986, 995 (7h Cir. 1999).

Hazeltine Research Inc., 339 U.S. 827, 831, 70 S. Ct. 894, 896, 94 L.Ed. 1312 (1950).

A genuine issue of material fact exists if: (1) there is a dispute of fact; (2) the disputed fact is material to the outcome of the case; and (3) the dispute is genuine, meaning a reasonable jury could return a verdict for either party. *RSBI Aerospace, Inc. v. Affiliated FM Ins. Co.*, 49 F.3d 399, 401 (8th Cir. 1995).

SUMMARY OF THE ARGUMENT

An abuse of discretion, warranting reversal judgment rendered to Plaintiff on all claims. Summary judgment should be used sparingly in employment discrimination cases.[13] Davis argues that the Appeals Court erred by granting judgment to Clarence Hammonds, Jr., Superintendent, and St. Louis Board of Education on her claim of racial and sex and age discrimination. Davis established a prima facie case of racial and sex and age discrimination: Plaintiff has established all the elements necessary for a prima facie case of race, age and sex discrimination (that is…(i) she is member of groups protected for age…over 40 years of age and sex (female) (ii) she applied for a position for which she met the qualifications for consideration, i.e. performing her job at a level that met the legitimate expectations of her employer; Plaintiff's employment with the St. Louis Public School District form 1985 through August 1993 was as a Certified Teacher; Plaintiff from September 1984 through August 1993 received a life time teaching certificate; without a time limitation. Plaintiff's Life Classification Certificate from the State of Missouri was for grades 1st through 8th and Home Economic 4th through 9th grades; Plaintiff taught Home Economics at Williams Middle School for two years; Plaintiff was later transferred to Walnut Park Elementary School teaching 1st and 2nd grades; furthermore the life time

[13] Crawford v. Runyon, 37 F.3d 1388, 1341 (8th Cir. 1994).

teaching certificate provided to the Plaintiff was not revoked, suspended nor had it expired; Plaintiff's work conduct and attendance during the period of her employment from 1985 to 1993 was above reproach; (iii) She was rejected and the employer solicited other applicants for the position of teachers for which the complainant applied. The material evidence submitted by Petitioner reveals that the Respondent on separate occasions hired several Caucasian applicants, which these claims herein were filed. *See Clark v. Runyon*, 218 F.3d 915, 918 (8th Cir.2000). Clearly the evidence presented was sufficient to raise a genuine issue of material fact regarding defendant's reasons for the employment action taken. *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 365 (8th Cir. 1994). Title 2000e-2, states that, (a) Employer practices, "It shall be an unlawful employment practice for an employer – (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

On the other hand, the evidence clearly demonstrates that the Defendant has not articulated a legitimate, non-discriminatory or credible reason for not ultimately hiring the Plaintiff for one of the many teaching positions that became available, and the findings of the Court should have so reflected.

The Respondent's original response in a letter dated December 28, 2001, was that "The charging party was not offered employment with the Board of Education because her application was not deemed to be the strongest of those which were received by Respondent". Moreover Respondent stated unequivocally that, "Respondent determined as early as February 1999 that it was not going to hire the charging party as a classroom teacher". Note should be made that there was not an EEOC investigation conducted, but rather a notification filed with the Respondent, which generated a

reply, but did not generate an EEOC investigation in accordance to the intent of the law. In the intervening time as the proceedings progressed the Respondent continuously sought unsubstantiated reasons for not hiring Petitioner; that the Petitioner was confrontational during the Job fair interviews, occurring in December 11, 1999; Petitioner's applications were incomplete in that they did not include copies of Petitioner's teaching certificate; did not include letters of reference from the school district in which Petitioner taught from 1995 to 1998; and finally with respect to Petitioner's April 2001 application, Petitioner did not identify that she had been arrested.[14] [15] Which was not true. These unsubstantiated assertions and reasons articulated by the Board are mere pretext to mask discrimination, and create a genuine issue of material fact. Conversely, the St. Louis Board of Education's own regulations, state that, "No applicant for employment shall be considered an active candidate until the Division of Human Resources receives a completed application for employment and requested references and educational credentials (when applicable), which are provided in accordance with district procedures related to application for employment,[16]**[Pet. App. F, relevant parts]**, this would have precluded any interview, yet Petitioner was interviewed on at least two separate occasions. Also, the guidelines speaks unambiguous that, "It shall be the responsibility of the superintendent of schools to recommend to the Board of Education for employment all teachers and

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[14] [violates Supreme Court decision Green v. Mo. Pacific Co., (1975)(CA 8) 523 F.2d 1290, and (1977) 549 F.2d 1158).

[15] Courts have repeatedly found that Blacks are convicted of crimes at a rate significantly in excess of their percentage of the population. Thus, any employment practice, which disqualified persons from employment because of conviction records can be expected to have a disproportionate adverse impact upon Blacks and would, therefore, be considered unlawful under Title VII.

[16] No applicant for employment shall be considered an active candidate until the Division of Human Resources receives a completed application for employment and requested references and educational credentials (when applicable), which are provided in accordance with district procedures related to application for employment.

other employees of the district. "Teacher selection is a cooperative process involving the superintendent, principals, and staff. [17]Irrefutably, Petitioner's application were mandated to be completed prior to any consideration in relation to her being interviewed and hired for a teaching position. Once more, Respondent was attempting to find some legitimate non-discriminatory reason for not hiring Petitioner. They cannot. Although neither of its specific reasons for refusing to hire Davis withstand scrutiny, the Respondent appears to argue that it can rebut a prima facie case by simply stating that its practice was to promote the most qualified and that that practice was followed. It cannot. While an employer has a right to select the most qualified employee, it cannot satisfy its burden of showing that it has in fact done so by a general statement that it hired the best qualified applicant. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.24 (1977). If an employer wishes to rely on the applicants' qualifications to rebut an inference of discrimination, it must produce legally sufficient proof that the person hired was in fact more qualified than the rejected plaintiff. *Burdine*, supra. 608 F. 563, 567 (5th Cir. 1979), cert. granted, 65 L.Ed.2d 1112 (1980); *Turner v. Texas Instruments*, 555 F.2d 1251, 1255 (5th Cir.). As the Court has ruled, "The employer bears the burden of showing by a preponderance of the evidence that the legitimate reason [for the employment practice] exists factually."[18]

The Respondent advances an additional argument, which is, in substance, that even if Davis were better qualified and more experienced than some of the hired, she is not entitled to recover because the record indicates that the Respondent selected other blacks for those positions in question. This

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[17] The human resource officer or a representative shall be responsible for recruiting suitable candidates for employment and assuring that persons nominated for employment in the district meet state certification requirements and/or the requirements of the Board of Education, as defined in the position's job description for which the nomination is made.

[18] Vaughn v. Westinghouse Elec. Corp., 620 F.2d 655, 659 (8th Cir. 1980).

argument, however, overlooks the fact that it is a violation of Title VII to discriminate on the basis of race against even a single person, regardless of the employer's general policy toward other minority group members. *See Cross v. US Postal Service* (CA 8 1981), 639 F.2d 409, 25 EPD H 31, 594.

The Courts recognize that just as statistical evidence is generally not sufficient basis, standing above, for a prima facie case of discriminatory treatment,[19] statistical evidence suggesting no discriminatory employment patterns, while relevant, does not generally in itself suffice to rebut a prima facie case of discriminatory treatment of a specific individual. *Cross vs. US Postal Service* (CA 8 1981), 639 F. 2d 409, 25 EDP H 31, 594. Nevertheless, since statistical evidence data may be relevant, data was requested by the Complainant through discovery procedures as to prior hires and rehires (for a two-year period preceding the hire and rehire of this case) made in the unit, or units in which the same selecting officials were responsible and/or the same selection or hiring procedures were followed. Notable, the Respondent through counsel argues, that the "Board" objects as these Interrogatories seek information that is overly broad and not reasonably calculated to lead to the discovery evidence, and further that the Board does not maintain for more than one year information regarding applicants who are not hired by the Board of Education. During discovery we solicited information from the Respondent regarding hiring and rehire persons' applications used by the Respondent, throughout these proceedings, made in the unit, or units in which the same deciding official was responsible and/or the same selection procedures were followed, yet we were rebuffed and denied the relevant information. Why did we not receive information regarding these selected applicants' application, hire and rehire made in the unit, or units in which the same

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[19] Harper vs. Trans World Airlines, (DC MO 1974) 385 F Supp 100a; aff'd (CA 8 1975) 525 F 2d 409

deciding official was responsible and/or the same selection procedures were followed, since the policy is universally applied to all applicants applying, whether they are hire and rehire? This refusal by the Respondent undermines the "Discovery Procedures. It is therefore impossible to determine statistically whether or not the hiring policy and procedures used herein were ones, which had an adverse impact against Blacks, females or individuals over 40 years of age.

The Board did not present any evidence of the percentage of those applicants requesting hiring or rehire or not hired, even though under the discovery process they are obligated to provide all relevant and material requested documentation.

The Supreme Court stated the principle that employment policies and practices, which have an adverse impact on minorities and women and are not justified by business necessity, constitute illegal discrimination under Title VII.[20]

In order to meet his burden, the employer must set forth, through admissible evidence, reasons, for Plaintiff's rejection. As the Supreme Court stated, the employer cannot meet its burden merely through an answer to the complaint or by argument of counsel, Burdine, supra, at note 9. The Respondent failed their burden.

More alarming is the record discloses that subsequent to the Plaintiff initial request for a teaching position in February 1999 through May 2002 the City of St. Louis School hired numerous applicants for the position of teacher, while ignoring the Plaintiff's application [**See Pet.App. G**], roster of persons hired and matrix; February 1999 through February 2000]. This matrix is self-explanatory and provides a clear

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[20] Griggs v. Duke Power Co., 401 U.S. 424.3 EPD 8137 (1971).

analysis of those applicants, hired during that period and adverse impact.

Very significant, and it can not be overly emphasis on August 23, 2001 Petitioner received via telephone a message from Joyce M. Roberts, Principal, Pierre at Laclede Elementary School regarding hiring. An interview was held and the Petitioner was hired as a teacher, and to report at 8: A.M., on August 27, 2001. **[Pet. App. H].** The Plaintiff's name was placed onto the work schedule, including providing a set of keys for he classroom, she received newsletters from the Respondent of scheduled activities, but Petitioner's hiring action failed to become effective, due to discriminatory reasons argued herein. The Petitioner was instructed to report to Human Resources, where she was supposedly to sign a contract, but it was never implemented. There was no explanation provided by the Respondent as to why there was no action. Throughout this entire current of events Petitioner's name continuously remained on the Board's roll as a viable applicant. Even though the Respondent's response to the EEOC investigator dated December 28, 2001, whereby Respondent declared that the Board determined not to hire the Petitioner as early as February 1999, that Petitioner's application was not strong, **[Pet. App. I, dated December 28, 2001].**

Mindful that the, Respondent accepted from Petitioner three separate applications, processing all three applications, accordingly. Note at no time during the intervening periods Petitioner was ever notified that applications were not being considered or there were some deficiencies with her applications. In fact the record establishes that the Petitioner was called via telephone and interviewed on at least two separate occasions, one being immediately subsequent to Petitioner filing an EEOC complaint with the Equal Employment Opportunity Commission June 2002 and the second being that the Petitioner was interviewed and hired for

a teaching position at Pierre Laclede School by Principal Roberts dated August 24, 2001. The mere fact that she was selected to be interviewed would negate the Respondent's allegations, "that Petitioner's application was not strong, incomplete, lack of documentation, places the Respondent's reasons in disrepute, while solidifying Petitioner's pretextual argument. Furthermore the record establishes that the Respondent provided incorrect and untruthful information when they attested [chosen by Principal Roberts] and rejected Petitioner [King, Human Resource] that no other person was hired after Petitioner. Contrary, to the Respondent's bare assertion the record establishes that Respondent hired Tonja Perkins, on August 25, 2001, **[Pet. App. H, above]** at Laclede School after the Plaintiff had been selected and hired by Principal Roberts on August 24, 2001, but rejected by King.

It should also be noted that Lavena Tomlinson, who was hired as a second-grade teacher instead was used in the position as third-grade teacher, that position Plaintiff was initially hired. All of these new hires were much younger than the Petitioner.

The Defendant also alleges that Plaintiff failed to present her lifetime certificate, this is untrue, which clearly reveals that Petitioner's teacher certificate was received, not to mention that a hand written note suggested that Plaintiff's employment file was to be pulled. Furthermore, the record establishes that the Respondent's Teacher Application states that, "A College Placement File or two [2] Letters of Reference", which is contrary to Respondent's argument that Plaintiff failed to present letters of recommendation from her previous employer. Accordingly, Plaintiff met the entire necessary prerequisite to process her application in accordance to Respondent's rules. Assuming, however, that the Respondent's articulate a legitimate business reason for its action. The Plaintiff has shown the District Court, as well as, the Appeals Court that the Respondent's articulate reasons for

its action was i) pretext ii) for unlawful discrimination.[21] The Defendant's actions undoubtedly were to mask discrimination.

The Plaintiff also asserts a claim of disparate treatment on the basis of age. The framework of burdens and presumptions used to analyze Title VII claims also applies to ADEA claims.[22] Therefore, the Supreme Court classic model of a prima facie case set forth in McDonnell Douglas Corp would be applicable in applying the burdens and presumptions set out above. In the context of hiring, a prima facie case of age discrimination follows the elements set out above in McDonnell Douglas, with age being the relevant consideration.

In defense of the ADEA claim, the Respondent proffers the same explanation, as under the Title VII claim discretionary authority and employment application was not strongest, etc. In addition, the Respondent argues and lower courts held hiring applicants that's over 40 years of age, and members of the protected class negates any claim of discrimination. Plaintiff disagrees. The Supreme Court has ruled that it is also unlawful to discriminate on the basis age between two individuals both of who are within the protected age group. Thus, where a younger individual within the protected age group is preferred over an older individual within the group on the basis of age, or vice-versa, the Act is violated.[23]

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[21] (citing St. Mary's Honor Ctr. V. Hicks, 509 U.S. 502, 510-11 (1993).

[22] Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir.1985).

[23] EEOC guidelines, supra; Moore v. Sears, Roebuck & Co., 464 F. Supp. 357, 361, 19 FED 246, 248 (N.D. Ga. 1979) (fact that employees were replaced by other members of protected class does not constitute evidence by which a defendant can conclusively rebut a prima facie showing of age discrimination. The Supreme Court emphasized that the ADEA prohibits discrimination "because of [an] individual's age." The statutory language "does not ban discrimination against employees because they are 40 or older [i.e., in the PAG]; it bans discrimination against employees because of their age, but limits the protected class to those who are 40 or older." 116 S. Ct. 1310. The Court observed: "The

In conclusion: For the above reasons, the Defendant is not entitled to dismissal or summary judgment because there are numerous issues of genuine fact in dispute and further these factual contentions in dispute can be resolved only upon credibility determination. Resolution of these disputes by a Judge in a summary judgment proceeding would deprive the Plaintiff of her statutory rights to trial by jury and her constitutional rights to trial by jury under the Seventh Amendment to the U.S. Constitution.

Respectfully submitted,

Una Mae Davis

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PRO SE

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fact that one person in the [PAG] has lost out to another person in the [PAG] is thus irrelevant, so long as he has lost out because of his age." O'Conner, supra.

APPENDIX A

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

NO.03-3744

Una Mae Davis.)
)
Appellant)
)
v.)
)
Cleveland Hammonds, Jr.)
Superintendent,)
)
Appellee,)

United States Court of Appeals
For The Eastern District of Missouri

No. 03-3821

)
Una Mae Davis,)
)
Appellant,)
v)
[UNPUBLISHED[ )
)
Cleveland Hammonds, Jr.)
Superintendent,)
)
Appellee,)

Submitted: June 17, 2004
File: June 24, 2004

Before BYE, McMILLIAN, and RILEY, Circuit Judges.

PER CURIAM.

In these consolidated appeals, Una Mae Davis appeals the district court's[1] adverse grant of summary judgment in her employment-discrimination lawsuit, and its dismissal of her related lawsuit. Having carefully reviewed, the record, we affirm. See Kenny v. Swift Transp., Inc., 347 F.3d 1041, 1044 (8th Cir. 2003) (summary judgment standard of review); Doe v. Sch. Dist. Of Norfolk, 340 F.3d 605, 613 (8th Cir. 2003) (Federal Rule of Civil Procedure 12(b)(6) standard of review.

Davis is African American and in her late sixties; she was employed by the St. Louis Public School District (District) as a teacher from 1985 to 1993. She filed two lawsuits against District Superintendent Cleveland Hammonds based on allegations arising from her unsuccessful application for elementary teaching positions in 1999, 2000, and 2001. In her first lawsuit (Davis I) – filed in June 2002 in federal court—Davis claimed race, age, and gender discrimination under Title VII and the Age Discrimination in Employment Act (ADEA).[2] After Davis's gender-discrimination claim was dismissed for lack of exhaustion, in May 2003 she filed a second lawsuit (Davis II) in state court, and the Missouri Human Rights Act (MHRA); the lawsuit was removed to federal court.

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[1] The Honorable Carol E. Jackson, Chief Judge, United States District Court for the Eastern District of Missouri.

[2] She did not specifically cite the ADEA, but the district court construed her complaint as asserting such a claim.

We agree with the district court that Davis did not create any trialworthy issues on her race- and age-discrimination claims. See Kenney, 347 F.3d at 1045 (describing burden shifting in Title VII case); Mayer v. Nextel W. Corp., 318 F.3d 803, 806-07 (8th Cir.) (applying-shifting analysis in ADEA case), cert. denied, 124 S.Ct. 153 (2003); Duncan v. Gen. Motors Corp., 300 F.3d 928, 930 n.2 (8th Cir. 2002) (noting Title VII and MHRA claims are analyzed using same legal principles, cert. denied, 538 U.S. 994 (2003). Further, even if Davis's August 2002 Equal Employment Opportunity Commission charge was timely as to her claim of gender discrimination, she also did not produce any evidence showing that the legitimate, nondiscriminatory reasons District gave for not hiring her were a pretext for gender discrimination. Finally, the lists of former teachers hired by District during the relevant period included many individuals who were as old or older than Davis, African American, and female, and Davis cannot compare herself to teachers hired for the first time by District, or to individuals who were hired at schools she did not contact or who were hired for teaching positions in high school. CF. EEOC v. Kohler Co., 335 F.3d 766, 775-76 (8th Cir. 2003) (instances of disparate treatment can support claim of pretext, but plaintiff has burden of proving that disparately treated employees were similarly situated in all relevant respects).

We also find that the district court did not abuse its discretion In denying Davis's motion to compel, see Roberts v. Shawnee Mission Ford, Inc., 352 F.3d 358, 360 (8th Cir. 2004) (appellate review of discovery orders is narrow and deferential), and that Davis II was properly removed to federal court, see Lindsey v. Dillard's Inc., 306 F.3d 596, 598 (8th Cir. 2003) (claims can be removed based on federal question jurisdiction, and if pendant state claims are closely related to federal claim, district court has supplemental jurisdiction over them). Davis's

remaining arguments provide no basis for reversal, and we decline to consider the arguments she raises for the first time on appeal.

Accordingly, we affirm. See 8th Cir. R. 47B.

B. Petitioner's initial EEO complaint filed with EEOC.

Una Mae Davis
4548 Clarence
Saint Louis, MO 63115

June 19, 2001

To whom it may concern,

Saint Louis' Public School District has discriminated against Una Mae Davis, because of their hiring practice o teachers in urban schools.

The June 10, 2001, Post-Dispatch Articles "New Teacher Is Put to the Test"; page 1, Everyday pages 1, 4, 5, and also "Obstacles, opportunities await teachers in urban schools"; page 5, will show that I have been discriminated against because of race, color, age, national origin, religion, and sex. The above articles are enclosed.

The St. Louis' Public School District failed to employ Una Mae Davis. I am holding a Life Teacher Certificate from the State of Missouri. A previous employee with years of satisfactory evaluations and perfect attendance from January 1985 threw June 1993.

Sincerely,

Una Mae Davis

C. Petitioner's Motion for Leave to Amend original Complaint.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNA MAE DAVIS,)
)
Plaintiff,)
)
v.)
)
CLEVELAND HAMMONDS,)
SUPERINTENDENT,)
ST. LOUIS PUBLIC SCHOOLS DISTRICT)
)

Plaintiff Demands Her Trial By Jury

MOTION FOR LEAVE TO AMEND COMPLAINT

1. **Plaintiff Una Mae Davis requests leave of the court to file an amended Complaint, which I have attached to this motion.**

2. **I am making this motion under Federal Rule of Civil Procedure 15.**

3. **I am asking the court to allow the filing of the Amended Complaint because it Adds discrimination charges of which are not part of my original Complaint.**

I respectfully request that this motion be granted.

_____

Una Mae Davis

D. Petitioner's Objection to Defendant's Notice of Removal.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNA MAE DAVIS,	)
Plaintiff,	)
	)
v.	)
Case N. 4:02CV0930CEJ	)
	)
CLEVELAND HAMMONDS, JR.,	)
SUPERINTENDENT,	)
CITY OF ST. LOUIS BOARD	)
OF EDUCATION,	)
Defendant.	)

OBJECTION TO DEFENDANT'S NOTICE OF REMOVAL

COMES NOW Plaintiff, Una Mae Davis, Pro Se, files this Motion in opposition to Defendant Cleveland Hammonds Notice of Removal of the above-entitled action to the United States District Court for the Eastern District of Missouri, Eastern Division, and for grounds for this opposition state as follows:

1. Plaintiff filed a charge of discrimination with the Equal Employment Opportunity on August 30, 2001, claiming race and sex and age and national origin and religion and color.

2. Plaintiff argued that the Defendant discriminated against Plaintiff based on her

race and age discrimination in connection with the denial of employment on three separate occasions between February 1999 and April 2001.

3. On August 15, 2002, the District Court dismissed Plaintiff's gender discrimination claim due to Plaintiff's allegedly failure to exhaust administrative procedures with respect to that claim.

4. Plaintiff filed a second claim of discrimination with the EEOC on August 22, 2002, purporting that she was subject to age and sex discrimination with respect to the denial of employment.

5. Plaintiff argues that she became aware in February of 2002 that the Defendant hired a younger Caucasian male applicant.

6. On September 30, 2002, Plaintiff filed an amended complaint with the District Court, which alleged age and gender discrimination, resulting from Plaintiff learning that the Defendant had hired a younger Caucasian applicant.

7. On October 23rd the District Court dismissed Plaintiff's claim of gender discrimination, for failure to state a claim upon which relief may be granted.

8. Plaintiff on November 7, 2002, filed a Motion for relief of Judgment or Order.

9. On November 12, 2002, the District Court denied Plaintiff motion for reconsideration or Motion for relief of Judgment or Order, but dismissed gender claim without prejudices.

10. On February 2003, Plaintiff received a Notice of Right to Sue letter from the Missouri Commission on Human Rights, informing the Plaintiff that any action brought in State Court under section 213.111 RSMo regulations shall be filed within Ninety Days from the date of the Commission's notification letter.

11. Plaintiff on May 22, 2003 filed in State Court a discrimination arguing that the Defendant discriminated against Plaintiff based on her race and sex and age discrimination in connection with the denial of employment subsequent to learning that the Defendant hired a Caucasian male.

12. Defendant on June 12, 2003, filed a Notice of Removal pursuant to 28 U.S.C. section 1441(b), "any civil action which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties."

13. Plaintiff argues that the Missouri Revised Statutes under Charter 213.055. state in pertinent part: (1) It shall be an unlawful employment practice: (1) for an employer, because of the race, color, religion, national origin, sex, ancestry, age or disability of any

individual, prohibitions identical to Federal anti-discrimination laws.

14. Plaintiff argues that the District Court has to turn over to the State Court claims which it has no subject matter jurisdiction, specifically subsequent to dismissing the Plaintiff's gender claim.

15. Plaintiff argues that in Buchner v. F.D.I.C., 981 F.2d at 819 note that there are only three situations under statute in which a federal trial court may remand a claim to state court, those circumstances are: (1) a trial court has discretion to remand state law claims that were removed along with one or more federal question claims; (2) it must act on a timely motion to remand based on a defect in removal procedure; and (3) it must remand a case over which it has no subject matter jurisdiction.

16. Plaintiff argues that the gender discrimination claim is not before the District Court for which it has no subject matter jurisdiction and therefore should be remanded to the State Court, since the Plaintiff's claim was dismissed without prejudice. The District Court does possess the discretionary authority to remand state law claims that were removed along with federal claims, Buchner, 981 F.2d at 819.

WHEREFORE, Plaintiff Una Mae Davis, pray that this action not be removed from the State Court and that the proceedings remain in the State Court for appropriate adjudication, and that Court make further orders as are just and proper.

Respectfully submitted

Una Mae Davis,
Plaintiff-Pro-Se
4548 Clarence Avenue
St. Louis, Missouri 63115

CERTIFICATE OF SERVICE

The above signature certifies that a copy of the foregoing instrument was served upon the Clerk of the District Court and attorney of record, (unless otherwise indicated) on this 14th date of July 2003, by hand delivery to the following: -

DISTRICT COURT
Clerk
United States District
Eastern District of Missouri
Eastern Division
St. Louis, MO 63101

Defendant Attorney

Kenneth C. Brostron, Esq.
REGULAR MAIL (postage prepaid)
714 Locust Street
St. Louis, Mo. 63101

James C. Hetlage, Esq.
714 Locust Street
St. Louis, MO 63101

E. Affidavit of Gloria King

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNA MAE DAVIS)
Plaintiff,)
v.)
Case NO. 4:02cv0930CEJ)
)
CLEVELAND HAMMONDS, JR.)
)
Defendant.)

AFFIDAVIT OF GLORIA H. KING

STATE OF MISSOURI)
) **SS**
CITY OF ST. LOUIS)

The undersigned, Gloria H. King, upon first being duly sworn upon her oath, states as follows:

1. I am a resident of the State of Missouri, and I am of lawful age and I am of sound mind capable of making this affidavit.

2. The facts stated in this affidavit are based upon my personal knowledge and my review of records maintained in the ordinary course of business of the Board of Education of the City of St. Louis.

3. I am employed by the Board of Education of the City of St. Louis as the Director of Teacher Services & Employee Relations. I have been employed by the Board of Education performing human resource duties for the St. Louis

Public Schools for over nineteen (19) years. At all times relevant hereto, I have served as the Director of Teacher Services & Employee Relations.

4. Cleveland Hammonds, Jr. is employed by the Board of Education of the City of St. Louis as the Superintendent of Schools and has been so employed since July 1, 1996.

5. Una Mae Davis was employed by the Board of Education of the City of St. Louis from 1985 to 1993. Ms. Davis resigned from her employment with the Board of Education in 1993.

6. Pursuant to Board of Education policy, each employment application for a teaching position is kept on file for one year.

7. Ms. Davis reapplied for employment with the Board of Education in 1999, 2000 and 2001.

8. Between February 1999 and February 2002, the Board of Education of the City of St. Louis hired teachers who had not previously worked as teachers in the St. Louis Public Schools and rehired numerous teachers who had previously taught in the St. Louis Public Schools.

9. Ms. Davis had previously taught in the St. Louis Public Schools before she reapplied for employment in 1999, 2000, and 2001.

10. Between February 1999 and February 2000, the Board of Education of the City of St. Louis hired 34 teachers who had previously worked as teachers in the St. Louis Public Schools.

11. List 1, attached hereto as Exhibit E-1, correctly identifies by name, race, date of birth, gender and date of hiring all teachers who had previously taught in the St. Louis Public Schools who were rehired by the Board of Education as teachers between February 1999 and February 2000.

12. Between February 1999 and February 2000, 31 of the total 34 teachers who had previously taught in the St. Louis Public Schools and who were rehired were over the age of 40.

13. Between April 2000 and April 2001, the Board of Education of the City of St. Louis hired 71 teachers who had previously worked as teachers in the St. Louis Public Schools.

14. List 2, attached hereto as Exhibit F-2, correctly identifies by name, race, date of birth, gender and date of hiring all teachers who had preiously taught in the St. Louis Public Schools who were rehired by the Board of Education as teachers between April 2000 and April 2001.

15. Between April 2000 and April 2001, 67 of the total 71 teachers who had previously taught in the St. Louis Public Schools and who were rehired were over the age of 40.

16. Between April 2001 and April 2002, the Board of Education of the City of St. Louis hired 99 teachers who had previously worked as teachers in the St. Louis Public Schools.

17. List 3, attached hereto as Exhibit E-3, correctly identifies by name, race, date of birth, gender and date of hiring all teachers who had previously taught in the St. Louis Public Schools who were rehired by the Board of Education as teachers between April 2001 and April 2002.

18. Between April 2001 and April 2002, 97 of the total 99 teachers who had previously taught in the St. Louis Public Schools and who were rehired were over the age of 40.

19. Ms. Davis was interviewed by various principals at a St. Louis Public School job fair in 1999.

20. During the job fair, multiple school principals advised me that Ms. Davis was acting in a confrontational manner at the job fair and that Ms. Davis was interrupting other job interviews during the job fair.

21. Although Ms. Davis had taught for three years in Texas, none of the reference letters submitted with any of her applications were from her prior employer.

22. The lack of employment references from Ms. Davis' previous employer caused me, as Director of Teacher Services, to question the strength of Ms. Davis' applications.

23. Ms. Davis' 2001 employment application did not indicate that Plaintiff had been arrested in 1999.

24. I determined that Ms. Davis' applications for employment were not the strongest.

25. Tracy Reynolds was hired as an elementary school teacher in Jefferson Elementary. Ms. Reynolds had the qualifications to be employed as an elementary school teacher.

26. I advised Joyce Roberts, Pincipal of Laclede School, on August 27, 2001, that due to low enrollment at Laclede School, Ms. Roberts did not have a third grade teaching vacancy to offer to Ms. Davis or any other individual.

27. Defendant had legitimate non-discriminatory reasons for not hiring Ms. David in that the Board of Education determined that she was not the strongest candidate for any open teaching positions.

Further Affiant sayeth not.

(s)
Gloria H. King, Affiant

Subscribed and sworn to before me, a Notary Public, this 30th day of June, 2003.

(s)
Notary Public

F. Respondent's Procedures on selection, in part.

ST. LOUIS BOARD OF EDUCATION POLICY PERSONNEL EMPLOYMENT

It is the policy of the St. Louis Public Schools to recruit and secure the best personnel available to fill all positions in the organization structure, and will do so by:

1. Maintaining a recruitment program designed to attract persons capable of performing competently in the positions established by the district.

2, Selecting the best qualified applicant for any position vacancy, based upon their ability to perform the essential functions of the job, with or without reasonable accommodations, the position specifications, rights and privileges guaranteed to individuals under state and federal mandates and Board of Education policies.

Responsibility for initiating and maintaining the employment policy is delegated to the superintendent of schools. The human resource officer shall be responsible for coordinating the administration, implementation and evaluation of the employment policy and its associated regulations.

Recruitment for Employment Employment Guidelines

The superintendent of schools or a representative shall determine the personnel needs of the district and present those

needs to the board in an annual budget request and/or when exceptional needs arise. It shall be the responsibility of the superintendent of schools to recommend to the Board of Education for employment all teachers and other employees of the district. The human resource officer or a representative shall be responsible for recruiting suitable candidates for employment and assuring that persons nominated for employment in the district meet state certification requirements and/or the requirements of the Board of Education, as defined in the position's job description for which the nomination is made. In carrying out the above responsibilities, the following guidelines shall be used in the selection of personnel:

In part:

1. Teacher selection is a cooperative process involving the superintendent, principals, and staff.

2. No applicant for employment shall be considered an active candidate until the Division of Human Resources receives a completed application for employment and requested references and educational credentials (when applicable), which are provided in accordance with district procedures related to application for employment.

3. There shall be no discrimination in the employment practices of the district due to age, sex, race, religion, national origin, creed, color, ancestry, veteran status, sexual orientation or disability of any individual.

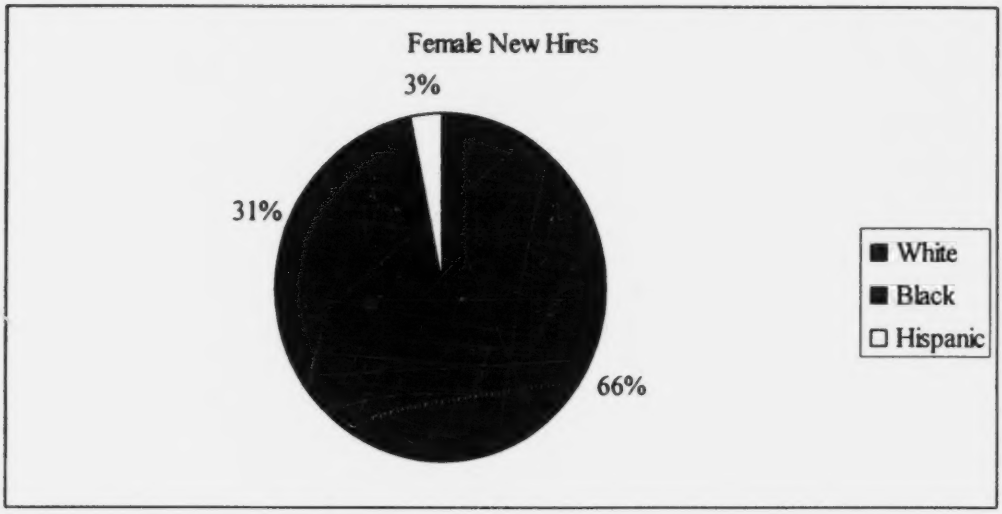
4. All candidates shall be considered on the basis of their merits; qualifications; their ability to perform the essential functions of the job, with or without reasonable accommodations; and needs of the system.

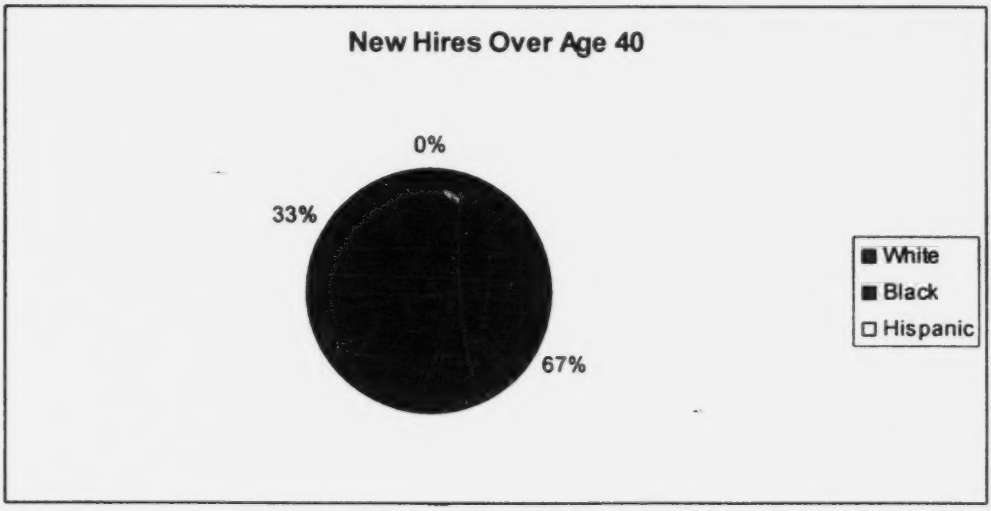
G. Hiring matrix for February 1, 1999 through February 1, 2000

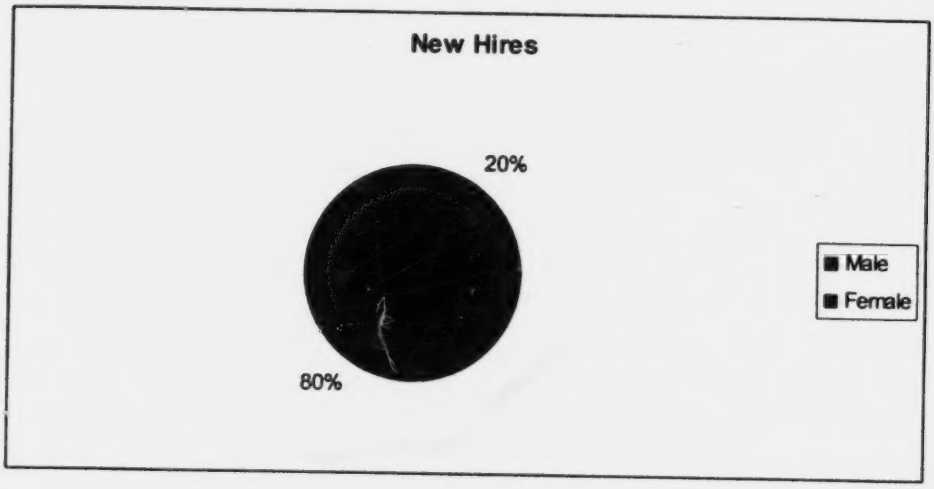
NEW HIRES

FEBRUARY 1, 99 THRU FEBRUARY 1, 00

Tearching Status	School	Hire Date	Birth Date	Race	Sex
Regular	Shepard Elem.	27-Aug-99	13-Oct-49	Black	F
Regular	Clark Elem.	27-Aug-99	7-Aug-51	Black	F
Regular	Shepard Elem.	27-Aug-99	4-May-56	Black	F
Regular	Shepard Elem.	27-Aug-99	30-Jun-65	Black	F
Regular	Laclede Elem.	27-Aug-99	5-Aug-69	Black	F
Regular	Mark Twain Elem.	3-Sep-99	9-Jun-65	Black	F
Regular	Oak Hill Elem.	15-Jan-00	7-Jun-45	Black	F
Regular	Dewey Int'l Study	15-Jan-00	11-Oct-65	Black	F
Regular	Bryan Hill Elem.	15-Jan-00	22-Aug-76	Black	F
Regular	Herzog Elem.	15-Jan-00	12-Sep-77	Black	F
Regular	Lafayette Elem.	27-Aug-99	20-Oct-66	Hispanic	F
Regular	Shenandoah Elem.	27-Aug-99	18-Jun-46	White	F
Regular	Dewey Int'l Study	27-Aug-99	10-May-48	White	F
Regular	Shepard Elem.	27-Aug-99	22-Nov-56	White	F
Regular	Hickey Elem.	27-Aug-99	23-Nov-65	White	F
Regular	Dewey Int'l Study	27-Aug-99	9-Nov-69	White	F
Regular	Wyman Elem.	27-Aug-99	30-May-71	White	F
Regular	Washington Montess	27-Aug-99	12-Feb-72	White	F
Regular	Washington Montess	27-Aug-99	1-Nov-72	White	F
Regular	Stix Early Childhood	27-Aug-99	2-Dec-73	White	F
Regular	Dewey Int'l Study	27-Aug-99	29-Dec-74	White	F
Regular	Kottemeyer Elem. ECC	27-Aug-99	17-Mar-75	White	F
Regular	Garfield Elem.	27-Aug-99	2-Apr-75	White	F
Regular	Mason Elem.	27-Aug-99	8-Jan-76	White	F
Regular	Clay Elem.	27-Aug-99	10-Dec-76	White	F
Regular	Lyon Acad Basic Inst	30-Aug-99	25-Sep-69	White	F
Regular	Lyon Acad Basic Inst	30-Aug-99	12-Feb-77	White	F
Regular	Mullanphy ILC	3-Sep-99	3-Feb-73	White	F
Regular	Sigel Elem.	12-Dec-99	16-Oct-72	White	F
Regular	Sigel Elem.	15-Jan-00	16-Sep-73	White	F
Regular	Wyman Elem.	15-Jan-00	20-Feb-74	White	F
Regular	Scullin Elem.	15-Jan-00	1-Jul-75	White	F
Regular	Oak Hill Elem.	27-Aug-99	16-Apr-50	White	M
Regular	Shepard Elem.	27-Aug-99	21-Apr-57	White	M
Regular	Cupples Elem.	27-Aug-99	23-Nov-65	White	M
Regular	Mann Elem.	27-Aug-99	23-Jun-70	White	M
Regular	Shepard Elem.	27-Aug-99	23-Sep-75	White	M
Regular	Hickey Elem.	27-Aug-99	20-Jan-76	White	M
Regular	Hamilton Elem.	27-Aug-99	27-May-76	White	M
Regular	Garfield Elem.	13-Sep-99	4-Apr-61	White	M


Female New Hires
3%
31%
66%
White
Black
Hispanic


New Hires Over Age 40
0%
33%
67%
White
Black
Hispanic


New Hires
20%
80%
Male
Female

H. Staffing Assignment of Petitioner at Pierre Laclede Elementary School.

Grade 5

Grade 1

203- Lisa Malone
120- Delores Lotts
206- Rosalyn Williamsom
119- Tonja Perkins

Grade 4

Kindergarten

201- Deborah Byrd
023- Myrtle Baker
204- Quida Robinson
023A- Donna Katke

Grade 3

Pre-School

205- Una Davis
024- Susie Glenn
207- Denise Muhammad
Ladora Fleming
209- Eunice Spratt

Grade 2

117- Laverna Tomlinson

I. Respondent's letter to EEOC, dated December 28, 2001.

December 28, 2001

Mr. Lee Bishop
Equal Employment Opportunity Commission
1222 spruce St., Room 8.100
St. Louis, Missouri 63108

RE: Una Davis v. St. Louis Board of Education;
EEOC Charge No. 280A11412

Dear Mr. Bishop:

This letter constitutes the position statement of Respondent Board of Education of the City of St. Louis with respect to the above referenced charge of discrimination. Una M. Davis, the charging party, alleges that Respondent discriminated against her based on her race and her age by failing to employ her as a teacher.

First, Ms. Davis' charge of discrimination is untimely. As she alleges in her charge of discrimination, she submitted application with Respondent in February 1999, April 2000, and April 2001. Respondent determined as early as February 1999 that it was not going to hire the charging party as a classroom teacher. The charging party is not permitted to extend the limitations period for filing a charge of discrimination by merely resubmitting an application for employment that has previously not been accepted. For this reason, we contend that Ms. Davis' charge of discrimination is untimely.

Secondly, Respondent's decision to not hire the charging party as a classroom teacher was not based on the

charging party's race or age. Respondent employs hundreds, if not thousands, of classroom teachers who are African American and over the age of 40. The charging party was not offered employment with the Board of Education because her application was not deemed to be the strongest of those which were received by Respondent. There is no evidence that Respondent's decision to not employ the charging party was based on her race or her age.

For the reasons stated above, Respondent requests that the charging party's charge of discrimination be dismissed. If you require any further information related to this matter, please contact the undersigned.

Very truly yours,

James C. Hetlage

Cc: Ms. Gloria King

(2)

No. 04-743

Supreme Court, U.S.
FILED
DEC 30 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNA MAE DAVIS,

Petitioner,

v.

CLEVELAND HAMMONDS, JR., SUPERINTENDENT, ST. LOUIS PUBLIC SCHOOL DISTRICT,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

KENNETH C. BROSTRON*
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Attorneys for Respondent Cleveland Hammonds, Jr., Superintendent of St. Louis Public School District

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

The Respondent objects to Petitioner's Questions Presented and offers the following as the correct issues to be considered on the Petition for Writ of Certiorari:

1. Whether the United States Court of Appeals for the Eighth Circuit has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power pursuant to Sup.Ct.R. 10 and 28 U.S.C. § 2101 (1988).

2. Whether the United States Court of Appeals for the Eighth Circuit entered a decision in conflict with the decision of another United States court of appeals on the same important matter as to call for an exercise of this Court's supervisory power pursuant to Sup.Ct.R. 10 and 28 U.S.C. § 2101 (1988).

RULE 14.1 STATEMENT

Petitioner is:

Una Mae Davis, an individual.

Respondent is:

Cleveland Hammonds, Jr., in his official capacity as Superintendent of the St. Louis Public School District.

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Cleveland Hammonds, Jr., former Superintendent of the St. Louis Public School District, respectfully requests that the Court deny the Petition for Writ of Certiorari seeking review of the decision of the United States Court of Appeals for the Eighth Circuit (Case No. 03-3744). The opinion is unpublished.

The Petition should be denied because it fails to satisfy any of the Court's criteria for a grant of certiorari. More specifically, the Petition should be denied because (i) the Eighth Circuit Court of Appeals neither departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by the United States District Court for the Eastern District of Missouri as to call for an exercise of the Court's supervisory power, and (ii) Petitioner failed to identify a genuine conflict with prior decisions of this Court or any other circuit. The Petition should further be denied pursuant to Sup.Ct.R. 15(2) on the grounds that the Petition contains material misrepresentations and omissions of fact.

JURISDICTIONAL STATEMENT

Davis I involved claims of race, gender and age discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1991). The district court accepted Davis' age discrimination claim as arising under the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. § 621 (1996), even though Davis purported to state all three claims as arising under Title VII of the Civil Rights Act of 1964. Jurisdiction of the

district court on the federal question claims was invoked pursuant to 28 U.S.C. § 1331 (1980).

Davis II involved claims of race, age and gender discrimination, in violation of Section 213.055 of the Missouri Revised Statutes and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1991). Jurisdiction of the district court on the federal question claims was invoked pursuant to 28 U.S.C. § 1331 (1980). The district court had supplemental jurisdiction of Davis' state law discrimination claims under 28 U.S.C. § 1367 (1990) because the state law claims formed part of the same case or controversy as the federal claims.

The United States Court of Appeals for the Eighth Circuit consolidated *Davis I* and *Davis II* under Case No. 03-3744.

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals in a per curium Order, dated June 24, 2004, affirmed Chief Judge Carol E. Jackson's granting of summary judgment in *Davis I* and her dismissal of *Davis II*. The Eighth Circuit Court of Appeals properly applied applicable legal principles to the record below and its decision in these consolidated discrimination cases is based upon fundamental and universally accepted principles of law, and does not involve a conflict among circuits, does not involve a question of national importance, and does not require the Court's review.

A. Davis' Prior Employment and Applications for Re-Employment

Hammonds was at all relevant times the Superintendent of the St. Louis Public Schools. Davis is an African-American female who is over the age of forty. Davis was employed by the Board of Education of the City of St. Louis as a certified teacher from 1985 to 1993. In 1993, Davis voluntarily resigned. From 1995 to 1998, Davis taught in Texas.

Davis submitted applications for employment with the Board of Education in February 1999, April 2000, and April 2001. Pursuant to Board of Education policy, each employment application for a teaching position is kept on file for one year.

In 1999, Davis was interviewed by various principals at a St. Louis Public School job fair. During the job fair, multiple school principals advised Gloria King, Director of Teacher Services, that Davis was acting in a confrontational manner at the job fair and that she was interrupting other job interviews during the job fair. Davis also failed to provide reference letters from where she had taught for three years in Texas. The lack of employment references from Davis' previous employer, coupled with her confrontational attitude, caused King to question the strength of Davis' applications. In 2000, Davis was arrested by the St. Louis City Police in connection with a protest on U.S. Interstate Highway 70. Davis falsely stated on her April, 2001 application that she had never been arrested.

As a result of the aforementioned issues, King made a legitimate and non-discriminatory determination that

Davis' applications for employment were not the strongest. Accordingly, Hammonds did not rehire Davis.

On August 24, 2001, Joyce Roberts, Principal of Laclede Elementary School, interviewed Davis for a third grade teaching position. Roberts selected Davis for the position and offered her a job without confirming teaching vacancies with the Board of Education's Human Resources Division. Davis reported for work on August 27, 2001. After a brief orientation, Roberts directed Davis to report to Human Resources to complete paperwork for her hiring. The Director of Teacher Services advised Roberts that she did not have a teaching vacancy to offer Davis because of low enrollment at Laclede School. Accordingly, on August 27, 2001, King informed Davis that she would not be assigned to Laclede School or any other school. Hammonds did not hire any other teacher to fill the position originally offered to Davis for the 2001-2002 academic school year.

B. Undisputed Material Facts As To Hammonds' Non-Discriminatory Hiring Practices

Between February 1999 and February 2002, the Board of Education hired teachers who had not previously worked as teachers in the St. Louis Public Schools and rehired numerous teachers who had previously taught in the St. Louis Public Schools.

Between February 1999 and February 2000, the Board of Education hired thirty-four teachers who had previously worked as teachers in the St. Louis Public Schools. Thirty-one of the thirty-four teachers who were rehired were over the age of 40; and thirty of them were African-American. Between April 2000 and April 2001, the Board of Education hired seventy-one teachers who had

previously worked as teachers in the St. Louis Public Schools, of which sixty-seven of them were over the age of 40 and sixty were African-American. Between April 2001 and April 2002, the Board of Education hired ninety-nine teachers who had previously worked as teachers in the St. Louis Public Schools, of which ninety-seven of them were over the age of 40 and eighty-one of them were African-American.

Davis points to just one individual as her evidence of pretext. Davis claims that the Board of Education's hiring of Tracy Reynolds is evidence of race and age discrimination. Reynolds was hired as an elementary school teacher at Jefferson Elementary. Davis does not dispute that she never applied for the teaching position at Jefferson that was offered to Reynolds. Davis offered no evidence of Reynolds' educational background, qualifications to teach, or teaching certifications.

C. Proceedings Below In *Davis I*

On August 30, 2001, Davis filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC") alleging claims of age and race discrimination. On or about March 27, 2002, the EEOC issued its Notice of Right to Sue on Davis' age and race discrimination claims.

On June 21, 2001, Davis filed a Complaint in the United States District Court for the Eastern District of Missouri alleging race, age and gender discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1991) ("*Davis I*"). On July 25, 2002, Hammonds filed his first Motion to Dismiss and Alternative Motion for Summary Judgment seeking, in

part, dismissal of Davis' gender discrimination claim on the grounds that Davis failed to exhaust her administrative remedies by failing to file a charge of discrimination with the EEOC alleging gender discrimination. On August 15, 2002, Chief Judge Carol E. Jackson dismissed Davis' gender discrimination claim.

On August 22, 2002, Plaintiff filed an EEOC Questionnaire with the EEOC, which Davis or the EEOC deemed to constitute a charge of discrimination (the "Second Charge"). In the Second Charge, Davis claimed she was subjected to age and sex discrimination. On September 18, 2002, the EEOC issued its Notice of Right to Sue on Davis' Second Charge.

On September 30, 2002, Davis filed an Amended Complaint alleging age and gender discrimination. Davis' Amended Complaint did not set forth a claim of race discrimination. On October 8, 2004, Hammonds filed a Motion to Dismiss Davis' Amended Complaint and Alternative Motion for Summary Judgment as to Davis' gender discrimination claim on the grounds that the Second Charge was not filed within the prescribed 300 days of the alleged discriminatory conduct. On October 23, 2002, Judge Jackson dismissed Davis' gender discrimination claim in the Amended Complaint for failure to state a claim upon which relief may be granted.

On June 30, 2003, Hammonds filed a Motion for Summary Judgment as to Davis' remaining age discrimination claim. On October 8, 2003, Judge Jackson granted Hammonds' Motion for Summary Judgment finding that Hammonds had articulated legitimate non-discriminatory reasons to not re-hire Davis and that Davis failed to present any evidence demonstrating pretext.

D. Proceedings Below In *Davis II*

As stated above, on August 22, 2002, Davis filed her Second Charge claiming that she was subjected to age and sex discrimination. On February 21, 2003, the Missouri Commission on Human Rights ("MCHR") issued Davis a Right to Sue letter bearing Charge No. FE-08/02-39673.

On May 22, 2003, Davis filed a Complaint in the Circuit Court of the Twenty-Second Judicial Circuit, City of St. Louis, Missouri, alleging claims of race, age, and sex discrimination, in violation of Mo.Rev.Stat. § 213.055 (2000) and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e (1991) ("*Davis II*"). In *Davis II*, Davis alleged that the Board of Education's personnel office unlawfully reversed a hiring decision regarding Davis on August 27, 2001.

On June 12, 2003, Hammonds filed his Notice of Removal to the District Court. On July 14, 2003, Davis filed a Motion to Remand and Objection to Defendant's Notice of Removal. On June 27, 2003, Hammonds filed a Motion to Dismiss. On October 8, 2003, Judge Jackson denied Davis' Motion to Remand finding that the District Court had subject matter jurisdiction over Davis' federal claims under federal question jurisdiction pursuant to 28 U.S.C. § 1331 (1980) and supplemental jurisdiction over her state law discrimination claims pursuant to 28 U.S.C. § 1367 (1990).

In addition, because Davis failed to file the Second Charge with the MCHR within the 180 day period[1] and failed to file the Second Charge with the EEOC within the

[1] Mo.Rev.Stat. § 213.075 (2000).

300 day period,[2] which began August 27, 2001, Judge Jackson dismissed all of Davis' claims in *Davis II* for failure to state a claim upon which relief may be granted.

E. Proceedings Before the United States Court of Appeals for the Eighth Circuit

On November 17, 2003, Davis appealed the District Court's decision in *Davis I* to the United States Court of Appeals for the Eighth Circuit (Court Case No. 03-3744). On November 25, 2003, Davis appealed the District Court's decision in *Davis II* to the United States Court of Appeals for the Eighth Circuit (Court Case No. 03-3821). The United States Court of Appeals for the Eighth Circuit consolidated *Davis I* and *Davis II* under Court Case No. 03-3744.

The Eighth Circuit Court of Appeals in a per curium Order dated June 24, 2004, affirmed Chief Judge Carol E. Jackson's granting of summary judgment in *Davis I* and her dismissal of *Davis II*. The Eighth Circuit held: (1) Davis failed to create any trial worthy issues on her race and age discrimination claims; (2) Davis' gender charge of discrimination was filed untimely with the Equal Employment Opportunity Commission; (3) Davis did not produce any evidence showing that the legitimate, non-discriminatory reasons proffered by Hammonds for not rehiring her were a pretext for discrimination; and (4) Davis failed to produce any evidence that she was treated in a disparate manner from similarly situated employees.

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[2] 42 U.S.C. § 2000e-5(e) (1991); 29 U.S.C. § 626(d)(2) (1991)

REASONS FOR DENYING THE PETITION

I. THE PETITION SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT NEITHER DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, NOR SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER.

A. In *Davis I*, The District Court Properly Dismissed Davis' Sex Discrimination Claim

In *Davis I*, Judge Jackson properly dismissed Davis' claim for sex discrimination under Title VII, both as asserted in her original Complaint and in her Amended Complaint because Davis failed to exhaust her administrative remedies.

The evidence unequivocally establishes that Davis did not make any claims of sex discrimination in her first charge of discrimination that she filed with the EEOC on August 30, 2001. Specifically, on the charge form she filed, Davis checked the boxes indicating claims of "race" and "age" discrimination, but did not check the box for "gender" or "sex" discrimination. Moreover, Davis made specific allegations that Hammonds denied her employment due to her race and age, but did not include any allegations that Hammonds acted based on her gender or sex. Lastly, the record below is devoid of any evidence that when the EEOC investigated Davis' race and age claims that it investigated Hammonds' employment practices regarding questions of gender or sex discrimination.

A plaintiff must exhaust her administrative remedies by filing charges with the appropriate administrative agency before filing an action under Title VII. *Williams v. Little Rock Mun. Water Works*, 21 F.3d 218, 222 (8th Cir. 1994); *Woelbling v. R.C. Wilson Co.*, 966 F. Supp. 858, 861 (E.D. Mo. 1997). A plaintiff will be deemed to have exhausted his or her administrative remedies as to allegations contained in a judicial complaint that are like or reasonably related to the substance of the charges timely brought before the EEOC. *Williams*, 21 F.3d at 222. A plaintiff may not bring a civil action that encompasses allegations outside the scope of the EEOC charge because that would undermine the role of the EEOC in investigating the claims and would deprive the charged party of sufficient notice of the claims against it. *Wallin v. Minnesota Dep't of Corr.*, 153 F.3d 681, 688 (8th Cir. 1998), *cert. denied*, 526 U.S. 1004 (1999); *Cobb v. Stringer*, 850 F.2d 356, 359 (8th Cir. 1988).

It is well established that individualized discrimination claims based on race or age do not obviously encompass an individualized claim based on sex so as to provide proper and sufficient notice that Davis was, in fact, asserting all three claims. *Sloop v. Mem'l Mission Hosp. Inc.*, 198 F.3d 147, 149 (4th Cir. 1999); *Davis v. Sodexho*, 157 F.3d 460, 464 (6th Cir. 1998); *Ajayi v. Aramark Bus. Services, Inc.*, 336 F.3d 520, 527 (7th Cir. 2003); *Duncan v. Delta Consol. Indus., Inc.*, 371 F.3d 1020, 1026 (8th Cir. 2004); *Williams*, 21 F.3d at 223; *Shikles v. Maytag Corp.*, 82 FEP Cases 1697 (W.D. Mo. 2000). Accordingly, pursuant to the well-established precedents, Judge Jackson properly dismissed Davis' sex discrimination claim as asserted in her original Complaint.

B. In *Davis I*, The District Court Properly Granted Summary Judgment for Hammonds on Davis' Age and Race Claims

In her original Complaint, Davis asserted claims of age, race and sex discrimination under Title VII based on Hammonds' alleged hiring practices. As set forth above, Judge Jackson properly dismissed the sex discrimination claim due to Davis' failure to exhaust her administrative remedies.

Judge Jackson subsequently granted summary judgment for Hammonds on Davis' age and race claims by finding that Hammonds articulated a legitimate non-discriminatory reason to not rehire Davis. Judge Jackson and the Eighth Circuit Court of Appeals further found that Davis failed to carry her burden to show that Hammonds' stated reasons were merely a pretext for intentional age or race discrimination. In fact, both Judge Jackson and the Eighth Circuit Court of Appeals found that Davis failed to adduce any evidence of pretext insofar as she failed to produce any admissible evidence that she was treated disparately than similarly situated individuals.[3] Instead, the courts below accepted data produced by Hammonds identifying all teachers rehired during the time Davis' applications were pending, which conclusively establishes that a substantial number of the teachers rehired during each of these three one-year periods were African-American and over the age of 40.

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[3] Davis admits that she has no knowledge of the qualifications, educational backgrounds, age or experience of the two employees to whom she seeks to be compared. Because of Davis' admitted ignorance, the courts below properly found that she failed to produce admissible evidence that the two individuals were similarly situated.

In summary, the Petition should be denied because the Eighth Circuit Court of Appeals neither departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by Judge Jackson, as to call for an exercise of this Court's supervisory power.

C. In *Davis II*, the District Court Properly Dismissed Davis' Age and Sex Claims

The district court and the Eighth Circuit Court of Appeals properly held that the Second Charge that formed the basis of Davis' discrimination claims in *Davis II* was untimely filed with the EEOC and MCHR. The undisputed material facts establish that on August 27, 2001, Davis was informed that she was not being hired as a teacher for the 2001-2002 academic school year. Davis did not file her Second Charge until August 22, 2002 – 370 days after the date she was informed of the alleged discriminatory act.

Under the Missouri Human Rights Act, any person alleging to be subjected to an unlawful discriminatory practice must file a complaint with the Missouri Commission on Human Rights within 180 days of the alleged discriminatory act. Mo.Rev.Stat. § 213.075 (2000); *Gipson v. KAS Snacktime Co.*, 83 F.3d 225, 228 (8th Cir. 1996). The statute of limitations is strictly construed. *Swartzbaugh v. State Farm Ins. Co.*, 924 F. Supp. 932, 934 (E.D. Mo. 1995). Under Title VII, a plaintiff must exhaust her administrative remedies in a dual filing state by filing charges with the appropriate administrative agency within 300 days of the alleged discriminatory conduct. 42 U.S.C. § 2000e-5(e) (1991); *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002); *Delaware State Coll. v. Ricks*, 449 U.S. 250 (1980); *Williams*, 21 F.3d at 222.

To revive her claims in *Davis II*, Davis cites an outdated and partially overruled Fifth Circuit case, *Reed v. Economic Opportunity Atlanta, Inc.*, 516 F.2d 924 (5th Cir. 1975), in support of her position for the adoption of a "discovery" rule.[4] Under Davis' "discovery" rule theory, the accrual date for the 180 and 300-day time limitation periods is the date the discriminatory "effects" of the adverse action became known. (Pet. at 10). Davis' "discovery" rule theory has been rejected by the Court.

In *Delaware State College v. Ricks*, 449 U.S. 250 (1980), the Court pronounced that the Title VII limitations period commences at the time the decision is made and communicated to the plaintiff, *even where the effects of the decision do not occur until some future date or are subject to change. Ricks*, 449 U.S. at 259-61 (emphasis added).

In *Morgan*, the Court elaborated on this point and stated that a discrete retaliatory or discriminatory act "occurs" on the day that it "happens" and, therefore, a party must file a charge within either 180 or 300 days of the date of the act or lose the ability to recover for it. *Morgan*, 536 U.S. at 512-514. Davis' own argument supports Hammonds' position insofar as she cites *Nance v. Maxwell Federal Credit Union*, 186 F.3d 1338, 1341 (11th Cir. 1999), for the proposition that limitation periods commence on the date of the discrete discriminatory act. (Pet. at 10).

In summary, Davis' "discovery" rule argument is in conflict with this Court's prior decisions in *Ricks* and *Morgan*. Judge Jackson's and the Eighth Circuit Court of

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[4] Davis further argues for equitably tolling the time limitations. See *infra* Section III.

Appeals' decisions in *Davis II* were legally correct in holding that Davis' Second Charge was untimely filed with the EEOC and, therefore, Davis failed to exhaust her administrative remedies. Therefore, the Eighth Circuit Court of Appeals neither departed from the accepted and usual course of judicial proceedings, nor sanctioned such a departure by Judge Jackson, as to call for an exercise of this Court's supervisory power.

II. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DID NOT ENTER A DECISION IN CONFLICT WITH A DECISION OF ANOTHER UNITED STATES COURT OF APPEALS AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

The Petition fails to identify an irreconcilable and intolerable conflict with prior decisions of the Court or any other circuit as to call for an exercise of the Court's supervisory power. Sup.Ct.R. 10 and 28 U.S.C. § 2101 (1988). To the contrary, the Petition does not set forth a single argument that the decision of the Eighth Circuit Court of Appeals is in conflict with decisions of the Court or any other circuit.

Furthermore, as set forth above, the decisions of Judge Jackson and Eighth Circuit Court of Appeals were based upon fundamental and universally accepted principles of law that did not involve a conflict among circuits or prior decisions of the Court. Because the decision of the Eighth Circuit Court of Appeals is legally correct and there is no mature conflict in the courts of appeals, the Court's review is not warranted. *Layne & Bowler Corp. v.*

Western Well Works, 261 U.S. 387, 392-93 (1923); *Keller v. Adams-Cambell Co.*, 264 U.S. 314, 320 (1924).

In summary, the Petition For Writ of Certiorari should be denied on the grounds that the Eighth Circuit Court of Appeals' decision is not in conflict with a decision of the Court or any other circuit as to call for an exercise of this Court's supervisory power.

III. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE IT CONTAINS MATERIAL MISREPRESENTATIONS AND OMISSIONS OF FACT

In accordance with his obligations under Sup.Ct.R. 15(2), Hammonds advises the Court that the Petition contains material misrepresentations and omissions of fact.

The Petition fails to inform the Court that Davis' equitable tolling argument was not properly preserved for appeal. The record below establishes that Davis' argument to toll the 180-day statutory time limitations for filing the Second Charge was first presented to the Eighth Circuit Court of Appeals. Federal appellate courts are not expected to pass on issues not decided by the district court. *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 29 (1983); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976); and *Kapp v. Naturelle, Inc.*, 611 F.2d 703, 709 (8th Cir. 1979). Accordingly, the Eighth Circuit Court of Appeals did not commit prejudicial error by not addressing Davis' equitable tolling argument.

In addition, the Petition sets forth false and misleading information relating to Davis' Amended Complaint in *Davis I*. The Petition states that Judge Jackson committed prejudicial error by reading her Amended Complaint in *Davis I* as not containing a race discrimination claim. (Pet. at 5). Davis' argument is factually and legally erroneous.

The Petition states that on September 30, 2002, Davis "unambiguously" informed the District Court that her Amended Complaint in *Davis I* was to add "sex and age" claims to the original complaint. (Pet. at 5).[5] Yet, it is undisputed that there is no record in the District Court file that Davis ever filed a Motion for Leave to file the Amended Complaint in September of 2002, much less an order granting such a motion.[6] Instead, the Amended Complaint in *Davis I* only sets forth claims of age and gender discrimination not a race discrimination claim. Lastly, the Petition fails to inform the Court that, despite the legal abandonment of Davis' race claim, Judge Jackson "out of an abundance of caution" fully addressed the merits of Davis' race claim in the context of Hammonds' Motion for Summary Judgment.

The Petition further contains false and misleading information about Davis' Opposition to Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment in *Davis I*. (Pet. at 6). Davis argues that Judge Jackson committed prejudicial error by granting Hammonds' Motion to Dismiss and Alternative Motion for Summary

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[5] Davis' original Complaint, filed on June 21, 2001, alleged race, age and sex discrimination

[6] The only Motion for Leave to Amend Complaint was filed by Davis on June 21, 2002, when she filed her original form Complaint and original type-written Complaint.

Judgment prior to reviewing her Opposition to Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment. (Pet. at 8). Davis' argument, however, fails to inform the Court of the full procedural history of Judge Jackson's granting of Hammonds' Motion to Dismiss and Alternative Motion for Summary Judgment. Davis fails to state that she filed a Motion for Reconsideration seeking to set aside the judgment, which was taken under consideration by Judge Jackson. The Petition further fails to state that Judge Jackson issued a Memorandum and Order, dated November 7, 2002 (improperly omitted from Petitioner's Appendix), that fully addressed the arguments contained in Davis' Opposition to Respondent's Motion to Dismiss and Alternative Motion for Summary Judgment. Thus, the Petition fails to set forth an accurate accounting of the procedural history of Hammonds' Motion to Dismiss and Alternative Motion for Summary Judgment, which upon review conclusively establishes that Judge Jackson thoroughly reviewed all of Davis' arguments in opposition to said motion. Accordingly, Judge Jackson did not commit prejudicial error by granting Hammonds' Motion to Dismiss and Alternative Motion for Summary Judgment or in denying Davis' request to set aside the judgment.

In summary, Hammonds respectfully submits that the Petition should be denied pursuant to Sup.Ct.R. 15(2) because Petitioner has knowingly provided this Court with material misrepresentations and omissions of fact.

CONCLUSION

For the reasons stated herein, Davis' Petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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